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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

BP CHEMICALS (HITCO) INC.,
Petitioner,
v.
ROBERT and JANET GAYLORD,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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38 pp

QUESTION PRESENTED

Whether the federal common-law government contractor defense preempts state law tort claims for liability for alleged design defects in military equipment, regardless of whether such claims are denominated under state law as "design defect" or "failure to warn" claims, in injury or death actions against suppliers of asbestos-containing materials that were mandatory for use, under the government contracts involved, in the construction of strategic guided missile propulsion systems from the 1950s through the 1970s.

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PARTIES TO THE PROCEEDINGS BELOW

Petitioner and defendant below is BP Chemicals (HITCO) Inc. ("BP Chemicals"), a California corporation. Respondents and plaintiffs below are Robert Gaylord and his wife, Janet Gaylord.

OPINIONS AND ORDERS BELOW

The unpublished memorandum opinion of the California Court of Appeal, First District, affirming the plaintiffs' judgment below, dated July 12, 1994, is reproduced in Petitioner's Appendix at Tab 20. The unpublished order of the California Supreme Court denying BP Chemicals' petition for review, dated October 13, 1994, is reproduced in Petitioner's Appendix at Tab 27. Final judgment was entered by the Superior Court for the State of California, City and County of San Francisco, on December 14, 1994.

JURISDICTION

This Court has jurisdiction to review the judgment by a writ of certiorari pursuant to 28 U.S.C. § 1257(a) (1988). The order of the California Supreme Court denying BP Chemicals' petition for review was entered on October 13, 1994. This petition is timely pursuant to 28 U.S.C. § 2101(c) (1988) and Sup. Ct. R. 13.1.

CONSTITUTIONAL AND FEDERAL COMMON LAW PROVISIONS

The Supremacy Clause, Article VI, Clause 2 of the United States Constitution, is reproduced in Petitioner's Appendix at Tab 1. This Court's decision establishing the federal common law government contractor defense, *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), is reproduced in Petitioner's Appendix at Tab 2.

STATEMENT OF THE CASE

This personal injury action, captioned *Robert Gaylord and Janet Gaylord v. BP Chemicals (HITCO) Inc.*, No. 891562 in the Superior Court for the State of California, City and County of San Francisco, arose from lung cancer suffered by Robert Gaylord. The plaintiffs, respondents herein, alleged that Mr. Gaylord's cancer was caused by the combined effect of his cigarette smoking and alleged occupational exposures to asbestos at Kaiser Aerospace ("Kaiser") in San Leandro, California, where he worked from 1956 until 1987. With respect to BP Chemicals, the plaintiffs alleged that Mr. Gaylord was exposed to asbestos contained in materials supplied by its predecessor U.S. Polymeric, which were used in fabricating certain parts for the rocket motor systems for the strategic guided missile programs in which Kaiser was involved.

A. *Factual Background*

1. *U.S. Polymeric*

From the 1950s through the present, U.S. Polymeric has designed and manufactured resin-impregnated ablative "tapewrap" that was required for use in the construction of the rocket motors for various strategic guided missile systems under contracts with the United States government or with government prime contractors. The tapewrap consists of fabric woven from any of several temperature-resistant industrial fibers, such as carbon, graphite or silica, impregnated with phenolic resin. (Appellant BP Chemicals' Opening Brief ("A.B.") (copy reproduced in Petitioner's Appendix at Tab 17), p. 4.) The tapewrap is used to fabricate ablative liners to protect the underlying rocket motor structures from heat during firing.[1] *Id.*

Until approximately the mid-1970s, U.S. Polymeric manufactured limited amounts of tapewrap using chrysotile, a form of asbestos. (A.B., p. 4). U.S. Polymeric's asbestos-containing

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[1] "Ablation," as pertinent to this action, is the process by which certain materials combine with, and are eroded by, the hot gases associated with thrust generation or high-speed atmospheric flight. *Id.*

tapewraps included materials designated as "FM 5075" and "FM 5076." *Id.* After learning of the potential hazards of asbestos exposure in the mid-1970s, at approximately the same time as other aerospace-industry suppliers of asbestos-containing products, U.S. Polymeric began including asbestos health hazard warnings with the boxes in which FM 5075 and FM 5076 were delivered. *Id.*, p. 5. At about the same time, U.S. Polymeric notified the industry that it would no longer manufacture asbestos-containing tapewrap, except in support of existing government contracts where continued production was required. *Id.*

One of the contractors to whom U.S. Polymeric supplied FM 5075 and FM 5076, as well as other ablative tapewraps that did not contain asbestos, was Kaiser Aerospace ("Kaiser") in San Leandro, California. U.S. Polymeric supplied approximately 35 orders of FM 5075 and FM 5076 to Kaiser, which comprised less than three percent of U.S. Polymeric's total supply of ablative tapewrap to Kaiser from the 1950s through the mid-1970s. (A.B., p. 25). Kaiser also purchased substantial quantities of asbestos-containing materials from other suppliers in support of government missile programs. *Id.*, p. 7.

At Kaiser, FM 5075 and FM 5076 were required for use in the fabrication of ablative liners for the rocket motors of the second-stage Polaris A3 and Poseidon missile systems. (A.B., p. 4). The liners were made by wrapping the tapewrap around appropriately shaped mandrels, curing the parts in autoclave ovens, and then lathing them to final dimensions. The lathing process generated dust, for which Kaiser installed various dust removal systems over the years.

The use of FM 5075 and FM 5076 in these missile programs was required under Kaiser's contracts with the government or with prime contractors. (A.B., p. 4). These contracts restricted Kaiser to using only the suppliers and products that were specified on the "qualified products list" (QPL) for the particular missile part involved. (A.B., pp. 26-27).

QPLs were created as an integral part of the missile design process, in which materials suppliers such as U.S. Polymeric would consult with government contractors and government offi-

cials, and would investigate whether improved materials could be developed for a new missile program, or if materials developed for previous missile programs should be used. (A.B., pp. 26-27). Materials under consideration were rigorously tested; qualification of an ablative tapewrap on a missile program, for example, typically involved at least 120 rocket motor test firings. *Id.*, p. 27.

Once the design of the missile system, including the associated QPLs, was reviewed and finally approved by the military, U.S. Polymeric, like other suppliers of qualified products, was prohibited from altering the products in any way, including changes in the raw materials used or the processes through which qualified products were made. (A.B., p. 27). Suppliers were also required to continue providing the qualified products throughout the life of a missile program, when theirs was the only product approved for use in a given application. *Id.*

2. *Robert and Janet Gaylord*

Plaintiffs Robert and Janet Gaylord are husband and wife. Robert Gaylord, age 59 at the time of the trial, suffers from lung cancer allegedly caused by the combination of asbestos exposure and cigarette smoking. (A.B., p. 5). According to the plaintiffs' medical expert witnesses, Mr. Gaylord's cancer is terminal. *Id.*

a. *Mr. Gaylord's Smoking*

Mr. Gaylord smoked cigarettes for 34 years, until only two months before being diagnosed with lung cancer. (A.B., p. 5). Mr. Gaylord smoked an average of one-half to three-quarters of a pack of cigarettes each day, and, during some periods, smoked as much as two packs per day. *Id.* The plaintiffs' medical experts agreed that Mr. Gaylord's smoking was a substantial factor in causing his lung cancer. *Id.*

b. *Mr. Gaylord's Asbestos Exposure*

From 1958 until he retired from Kaiser in 1987, Mr. Gaylord operated a tracer lathe, a machine that follows templates to machine parts to precise tolerances. (A.B., p. 6). At trial, Mr. Gaylord testified that most of the asbestos-containing parts

on which he worked were for the Minuteman and Advanced Minuteman systems, and that he machined some 90 percent, or, in his words, "thousands and thousands," of Advanced Minuteman nosecones, which used an asbestos-containing tapewrap supplied by Raybestos-Manhattan. *Id.*, pp. 6-7. Mr. Gaylord also recalled working on the Polaris, on which U.S. Polymeric's asbestos-containing tapewrap was used. *Id.*, pp. 4, 6. With respect to the Poseidon, for which U.S. Polymeric also supplied asbestos-containing tapewrap, Mr. Gaylord testified that he only worked on a few of the subassemblies for these missiles, and the plaintiffs did not contend this was a significant source of any asbestos exposure. *Id.*, p. 7. Kaiser also purchased substantial quantities of asbestos-containing materials from other suppliers, including Dexter and Raybestos-Manhattan. *Id.*, pp. 6-7.

B. *Procedural Background*

Plaintiffs filed their personal injury action on May 4, 1988, alleging design defect and failure-to-warn claims under California law against BP Chemicals and numerous other defendants. (Plaintiffs' Complaint (reproduced in Petitioner's Appendix at Tab 4)). Plaintiffs theory of liability against BP Chemicals was that Mr. Gaylord was exposed to asbestos contained in U.S. Polymeric's tapewrap while lathing missile parts, that these exposures combined with his cigarette smoking to cause lung cancer, and that U.S. Polymeric failed to warn Mr. Gaylord, or other workers at Kaiser who handled asbestos-containing tapewrap, of asbestos health hazards. (A.B., pp. 7-8).

In defense, BP Chemicals contended that Mr. Gaylord's cancer was caused by cigarette smoking alone, and that, in any event, his alleged exposures to FM 5075 and FM 5076 were too insubstantial to have caused any health risk. (A.B., p. 10). As an affirmative defense, BP Chemicals also presented the "government contractor defense" established by this Court in *Boyle v. United Technologies*, 487 U.S. 500 (1988) ("Boyle").[2] *Id.*, pp. 10-11. Before trial, the plaintiffs dismissed their actions against

[2]The Boyle government contractor defense, which is discussed more fully herein, precludes tort liability for design defects in military products or

all defendants except BP Chemicals and one other, who settled with the plaintiffs at the midpoint of the trial. *Id.*, p. 3.

After taking evidence on liability issues during the second half of the trial,[3] the parties presented cross-motions to determine the applicability of the government contractor defense to the plaintiffs' design defect and failure-to-warn claims. (A.B., p. 11; BP Chemicals' Motion for Direct Verdict (reproduced in Petitioner's Appendix at Tab 6)). The court struck the defense with respect to both causes of action, expressly relying on the cases of *In re Hawaii Federal Asbestos Cases (Kaiu v. Raymark)*, 960 F.2d 806 (9th Cir. 1992) (holding that commercial asbestos insulation used on Navy ships is not "military," rendering *Boyle* inapplicable) and *Jackson v. Deft, Inc.*, 223 Cal.App.3d 1305, 273 Cal.Rptr. 214 (1990) (*Boyle* defense inapplicable where United States did not prevent manufacturer from supplying warning with product). (Reporter's Transcript of June 23, 1992, Hearing (reproduced in Petitioner's Appendix at Tab 7)).

The court then instructed the jury under California strict products liability law in the rules to apply in determining BP Chemi-

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equipment from being imposed under state products liability laws in cases where the following three factual elements exist:

(1) the United States approved reasonably precise specifications for the design of the product or equipment;
(2) the equipment was manufactured in conformity with the approve design specifications; and,
(3) the supplier warned the United States of any dangers associated with the use of the equipment that were known to the supplier but not to the United States.

Boyle, 487 U.S. at 512.

[3]The trial was "reverse bifurcated," with damages and causation issues tried in Phase I, and liability issues, including contributory negligence, tried in Phase II.

cals' alleged liability to the plaintiffs.[4] Under these instructions, the jury returned special verdicts finding that Mr. Gaylord's can-

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[4] The court instructed the jury as follows with respect to determining BP Chemicals' liability under the plaintiffs' "design defect" and "failure-to-warn" causes of action:

> In this case plaintiff [*sic*] seeks to establish liability on the part of defendant on one or both of two different claimed bases for recovery.
>
> The first is the claim that the product in question was defective. I am now instruct [*sic*] on the law as it relates to the claim of a defective product.
>
> The manufacturer or distributor of a product is liable for injuries legally caused by a defect in its design which existed when it left the possession of the manufacturer or distributor provided that the injuries resulted from a use of the product that was reasonably foreseeable to the manufacturer or distributor.
>
> A product is defective in design if the product fails to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner.
>
> Plaintiff's second claim is that the product in question was defective in light of the manufacturer's failure to warn. I will now instruct you on the law as it relates to this claim.
>
> A product is defective if the use of the product in a manner that is reasonably foreseeable by the defendant involves a substantial danger that would not readily — not be readily recognized by the ordinary user of the product and the manufacturer fails to give adequate warning of the danger.
>
> The manufacturer has a duty to provide an adequate warning to the consumer of a product of potential risks or side effects which may follow the foreseeable use of the product, and which are known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge at the time of manufacture and distribution.
>
> In deciding whether defendants should be held strictly liable for the injury to the plaintiff, you are to focus on the condition of the asbestos-containing products themselves, and not on the reasonableness of defendant's conduct.
>
> There is no requirement that a manufacturer must give a warning which could not be effective in lessening the plaintiff's risk of harm.
>
> In a strict liability action, it is no defense that BP Chemicals had no actual knowledge the products were defective.

cer was linked to asbestos exposure, and that the plaintiffs had suffered a total of $1,504,000 in past and future economic and non-economic damages. (Phase I Special Verdict Form, Nos. 3-5 (reproduced in Petitioner's Appendix at Tab 9)). The jury allocated liability as follows: 10 percent to Mr. Gaylord, for his contributory negligence in smoking; 25 percent to BP Chemicals; and 65 percent to other parties who were responsible for Mr. Gaylord's asbestos exposure. (Phase II Special Verdict Form, No. 6 (reproduced in Petitioner's Appendix at Tab 9)). After adjusting the award for settlement credits and applying California law limiting liability for non-economic damages in proportion to comparative fault, the court entered judgment against BP Chemicals for $981,159. (Judgment Nunc Pro Tunc (reproduced in Petitioner's Appendix at Tab 15)). Subsequently, the court denied BP Chemicals' motion for a new trial. (Order Denying Motion for New Trial (reproduced in Petitioner's Appendix at Tab 14)).

BP Chemicals then appealed to the California Court of Appeal. (Notice of Appeal (reproduced in Petitioner's Appendix at Tab 13)). Among other issues, BP Chemicals argued that the trial court erred in striking the government contractor defense with respect to the plaintiffs' design defect claims. (A.B., pp. 15-30). With respect to the failure-to-warn claims, BP Chemicals presented several defenses based on state law, in recognition of the First District's recent ruling, in *Jackson v. Deft, Inc., supra*, 223 Cal.App.3d 1305, that the *Boyle* defense is inapplicable to failure-to-warn claims except under certain exceptional circumstances not existing in this case.[5]

In their opposition brief, the plaintiffs did not seriously dispute that the trial court's order striking the government contractor

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(Reporter's Transcript of June 24, 1992, Proceedings (reproduced in Petitioner's Appendix at Tab 8)).

[5] BP Chemicals' state-law defenses were based, in part, on the lack of evidence that any warnings U.S. Polymeric could have given would have reached Kaiser factory workers. Mr. Gaylord, for example, testified that he was never notified of the asbestos health warnings that were included with shipments of FM 5075 and FM 5076 beginning in the mid-1970s. (A.B., pp. 34-37).

defense with respect to their design defect claims was clearly erroneous. Instead, the plaintiffs based their opposition upon the inapplicability of the government contractor defense to their failure-to-warn claims, arguing that, regardless of how the Court of Appeal resolved the appeal from the design-defect verdict, the defense should not be applied to their failure-to-warn claims. (Opening Brief of Respondents and Cross-Appellants (reproduced in Petitioner's Appendix at Tab 18), pp. 26-28). Finding the issue squarely before it, the Court of Appeal affirmed the judgment based on the inapplicability of the government contractor defense to the failure-to-warn claims. (Memorandum Opinion of Court of Appeal (reproduced in Petitioner's Appendix at Tab 20), pp. 8-10). The Court of Appeal's only comment with respect to the application of the government contractor defense to the plaintiffs' design defect claims was that "[w]e need not reach that issue because the problem here is that defendants were unable to demonstrate a 'significant conflict,' indeed any conflict, between their state duty to warn and the government specifications for the tape." *Id.*, p. 9.

After the Court of Appeal denied BP Chemicals' petition for rehearing (reproduced in Petitioner's Appendix at Tab 21), BP Chemicals timely petitioned the California Supreme Court for review. (Petition for Review (reproduced in Petitioner's Appendix at Tab 24)). The state supreme court denied the petition on October 13, 1994, leaving BP Chemicals with the present petition for a writ of certiorari to the California Court of Appeal as its sole remaining recourse. (Order Denying Petition for Review (reproduced in Petitioner's Appendix at Tab 27)).

REASONS FOR GRANTING THE PETITION

A grant of certiorari is necessary in this case to establish, in state law products liability cases arising from the United States' procurement of military equipment to which the government contractor defense potentially applies, that federal law determines whether a cause of action is preempted as one for "liability for design defects in military equipment," *Boyle,* 487 U.S. at 512, regardless of whether that cause of action is denominated under state law as a "design defect" or "failure-to-warn" claim. Since

the Court's decision in *Boyle* nearly seven years ago, this issue has been implicit in cases alleging various state tort claims, including, in particular, claims for liability for failures to warn ultimate users of military equipment of alleged design defects.

An important split in authority exists among the United States Circuit and state high courts with respect to the treatment, under the government contractor defense, of products liability claims denominated as "failure-to-warn," rather than "design defect" causes of action. This split in authority has substantially undermined the uniformity of liability rules in actions against government contractors that *Boyle* was intended to accomplish. The current majority view, furthermore, practically eviscerates the defense in a great many cases. Under this view, the *Boyle* defense is held generally inapplicable to claims for liability based on a "failure to warn" ultimate users of the alleged design defect, even in cases where the court finds that *Boyle* clearly precludes a plaintiff's state-law "design defect" claims.

Under the majority rule, therefore, the effectiveness of the government contractor defense often hinges on whether, under the facts of the case, a particular state's tort laws allow a plaintiff to state a cause of action for failure to warn separately from a "design defect" claim, not whether the elements of the *Boyle* defense are found to exist. In this substantial way, the liability of suppliers for design defects in military equipment is still controlled by state law, nearly seven years after *Boyle*.

Although, in a significant minority of jurisdictions, the government contractor defense has been broadly applied to state products liability claims regardless of the particular denomination of that claim under state law (*e.g.*, "design defect," "failure-to-warn" or "breach of warranty"), these courts have not advanced any consistent rationale underlying their holdings. The minority view, however, is consistent with the proper view that, to preserve the uniformity of rules governing government contractor liability that is a "key justification" for the government contractor defense, *Harduvel v. General Dynamics Corp.*, 878 F.2d 1311, 1317 (11th Cir. 1989), *cert. denied*, (1990) 494 U.S. 1030, *reh. denied*, (1990) 495 U.S. 942, 110 S.Ct. 2199 (1990), uniform federal rules must be applied to determine whether the substance of a

plaintiff's state law claim is for "liability for design defects" for purposes of applying the *Boyle* defense.

Petitioner suggests that a readily available reference for determining whether a state law products liability claim is a claim for "liability for design defects" for purposes of the government contractor defense can be found in section 402A of the Restatement (Second) of the Law of Torts (hereinafter, "the Restatement"). Adoption of the Restatement section as the reference for determining this issue would ensure uniformity of application of an effective government contractor defense, while displacing state law to the minimum extent necessary consistent with this purpose. The Restatement section groups claims for failures to warn ultimate users of product defects within claims for liability for defective product designs.

As noted, the California Court of Appeal's ruling that the government contractor defense does not, absent exceptional circumstances, apply to failure-to-warn claims, was dispositive of petitioner's appeal. As discussed herein, had the Court of Appeal reviewed the issue, it would have been required to reverse the trial court's order striking the government contractor defense as to the plaintiffs' design defect claims. The Court, therefore, should grant the requested writ of certiorari to establish that uniform federal, not state, law determines the tort claims to which the government contractor defense is applicable, and that many state law claims for a "failure to warn" ultimate users of defects in product design, like state law "design defect" claims, are claims for "liability for design defects" for purposes of the government contractor defense.

I. A SPLIT IN AUTHORITY EXISTS WITH RESPECT TO THE TREATMENT OF FAILURE-TO-WARN CLAIMS UNDER THE GOVERNMENT CONTRACTOR DEFENSE, DEROGATING THE UNIFORMITY OF APPLICATION AND EFFECTIVENESS OF THE *BOYLE* DEFENSE

The Court held in *Boyle* that, in cases where its factual predicate exists, the federal common-law government contractor defense displaces state tort theories alleging "liability for design

defects" in military equipment. *Boyle, supra*, 487 U.S. at 512. The circuit courts of appeal and state high courts construing this crucial phrase, however, have split over the issue of whether the *Boyle* defense is strictly limited in application to causes of action denominated under state law as "design defect" claims, or whether the defense applies more broadly to other products liability claims for injury or death caused by defective equipment designs, including, in particular, claims for failures to warn ultimate users of alleged design defects. Because of this split in authority, the uniformity and effectiveness of rules governing government contractor liability that *Boyle* was intended to accomplish have been seriously diminished.

A minority of the courts deciding the issue, including the fifth and sixth circuit courts of appeal, have held that the government contractor defense applies broadly to state-law claims for liability for design defects, including claims for failures to warn ultimate users. The courts in most of these cases, however, have simply cited to Boyle for support, rather than providing a detailed discussion of the issue. *See: Smith v. Xerox Corp.*, 866 F.2d 135, 136-37 (5th Cir. 1989) (*Boyle* applicable to design defect, failure-to-warn and breach of warranty claims); *Niemann v. McDonnell Douglas Corp.*, 721 F.Supp. 1019, 1024 (S.D. Ill. 1989) (*Boyle* applicable to design defect and failure-to-warn claims); *Miller v. United Technologies, slip. op*, Nos. CV 85 022 17 88S, CV 85 022 75 18S, 1993 Westlaw 280191 (Conn. Super., July 16, 1993) (following *Niemann*).

In other cases, including some decided previously to *Boyle*, the courts have held the government contractor defense generally applicable to failure-to-warn claims based on the theory that "warnings in general are safety components of the product, the existence of which are dictated by the design specifications," *Ramey v. Martin-Baker Aircraft Co.*, 656 F.Supp. 984, 999-1000 (D.Md. 1987) *aff'd*, 874 F.2d 946 (4th Cir. 1989), or on the basis that *Boyle* displaces all state products liability laws when such laws are in "significant conflict" with the United States' interests in the performance of military procurement contracts. *In re Aircraft Crash Litigation Frederick, Maryland*, 752 F.Supp. 1326, 1365 (S.D. Ohio 1990), *aff'd*

sub nom Darling v. Boeing (table). *Cf., McKay v. Rockwell Intern. Corp.*, 704 F.2d 444 (9th Cir. 1983), *cert. den.*, 464 U.S. 1043 (1984) (holding defense applicable to Restatement (Second) of Torts § 402A causes of action in wrongful death action under Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 761-67); *but see, In re Hawaii Federal Asbestos Cases (Kaiu v. Raymark Industries, Inc.)*, 960 F.2d 806 (9th Cir. 1994) (holding *Boyle* generally inapplicable to state-law failure-to-warn claims).

The majority of courts deciding the issue, including the second, ninth and eleventh circuit courts of appeal, and several state high courts, on the other hand, have held that the government contractor defense is generally inapplicable to state-law causes of action other than "design defect" claims, and only applies to failure-to-warn claims under exceptional circumstances. *In re Joint E. & S. Dist. New York Asbestos Litigation (Grispo v. Eagle-Picher Industries, Inc.)*, 897 F.2d 626 (2d Cir. 1990) ("*New York Asbestos Litigation*"); *In re Hawaii Federal Asbestos Cases, supra*, 960 F.2d 806; *Dorse v. Eagle-Picher Industries, Inc.*, 898 F.2d 1487 (11th Cir. 1990). *See also: Jackson v. Deft, Inc., supra*, 223 Cal.App.3d 1305; *Anzalone v. Westech Gear Corp.*, 638 A.2d 1365 (N.J. Super. 1994), *cert. granted*, 645 A.2d 142 (N.J. 1994).

As the Second Circuit held in *New York Asbestos Litigation, supra*, 987 F.2d at 813,

> Stripped to its essentials, the military contractor's defense under *Boyle* is to claim, "The Government made me do it." *Boyle* displaces state law only when the Government, making a discretionary, safety-related military procurement decision contrary to the requirements of state law, incorporates this decision into a military contractor's contractual obligations, thereby limiting the duties to warn.

See also: Garner v. Santoro, 865 F.2d 629, 636-37 (5th Cir. 1989) (requiring defendant to prove existence of "an identifiable federal interest or policy in the existence or methods of warning and a

significant conflict between that federal interest or policy and the operation of state law"); *In re Hawaii Federal Asbestos Cases, supra*, 960 F.2d at 813 (quoting *New York Asbestos Litigation); Timberline Air Service, Inc. v. Bell Helicopter-Textron, Inc.*, ____ P.2d ____, 63 U.S.L.W. 2344, 1994 Westlaw 657895 (same). The only other circumstance under which these courts hold the *Boyle* defense applicable to failure-to-warn claims is when the failure-to-warn claim is "merely duplicative" of a plaintiff's design defect claim. *Timberline Air Service, Inc. v. Bell Helicopter-Textron, Inc., supra, citing, Koutsoubos v. Boeing Vertol, Div. of Boeing Co.*, 553 F.Supp. 340 (E.D. Pa. 1982).

As well as diminishing the uniformity of rules of government contractor liability that *Boyle* was intended to achieve, the majority view seriously undermines the effectiveness of the government contractor defense in a great many cases. Under the majority view, the protection offered by the government contractor defense falls away in many cases where applicable state law allows a plaintiff to state a "failure to warn" claim separately from a "design defect" cause of action. In addition to leaving the liability of government contractors for design defects in military equipment largely controlled by the manner in which state law denominates the substance of a tort claim, the majority view eviscerates the government contractor defense almost entirely in cases, like the present matter, where the jury verdict was based on strict liability. In such cases, it generally will not be possible to establish the government contractor defense, because the danger causing the plaintiff's injury will often have been beyond the grasp of reasonable knowledge at the time the military products at issue were designed and manufactured, and, therefore, would not have been actually considered by either the contractor or the United States.

II. A UNIFORM RULE BASED ON GENERAL PRODUCTS LIABILITY LAW SHOULD BE APPLIED TO DETERMINE WHETHER A PLAINTIFF'S STATE LAW PRODUCTS LIABILITY CLAIMS, INCLUDING FAILURE-TO-WARN CLAIMS, ARE FOR "LIABILITY FOR DESIGN DEFECTS" FOR PURPOSES OF THE GOVERNMENT CONTRACTOR DEFENSE

The need for an effective and uniformly applied government contractor defense that *Boyle* was intended to address requires that the defense, as under the minority view identified above, be applied to products liability claims for design defects in military equipment, regardless of whether those claims are denominated under state law as "design defect" or "failure-to-warn" claims, or in some other manner. Application of the government contractor defense to such claims is the only approach that is consistent with the protection of the United States' important interests in the performance of military procurement contracts that the Court recognized in *Boyle*.

Petitioner suggests that section 402A of the Restatement (Second) of the Law of Torts provides a readily available reference for determining whether, for purposes of the government contractor defense, a state-law products liability claim comprises a claim for liability for design defects in military equipment. Adopting the general common law liability rules set forth in the Restatement section for this purpose would ensure the uniform application of an effective government contractor defense, while displacing state law to the minimum extent necessary consistent with this purpose. Adopting a uniform rule on this issue would also be consistent with the treatment of state law claims in other areas concerning important federal interests, in which uniform federal rules are used for the purpose of characterizing the substance of a plaintiff's claims.

A. Applying the Government Contractor Defense Broadly to State Law Claims for Liability for Design Defects Is the Only Approach Consistent With *Boyle*

In *Boyle*, the Court adopted a "broad formulation of the government contractor defense" to ensure uniformity in the rules

governing the liability of suppliers for defects in products supplied to the United States in conformity with government-approved designs. *Harduvel v. General Dynamics Corp., supra,* 878 F.2d at 1317. The only limitation the Court placed on the defense was to exempt claims for manufacturing defects. *Id.* at 1317. Petitioner submits that there is no sound reason for authorizing an additional exemption for claims based on a failure to warn ultimate users of the design defect on which a plaintiff's tort claims are based.

The need for a broad formulation of the government contractor defense is particularly apparent in the military procurement context. Ordinary products liability laws should not be applied to claims for liability for design defects in military equipment because military designs must respond to considerations that do not exist in the consumer marketplace — including, specifically, "the trade-off between greater safety and greater combat effectiveness." *Boyle*, 487 U.S. at 511. "Meeting adequately the needs of national defense, not accident costs, is the ultimate standard by which purchases of military equipment should be measured." *McKay v. Rockwell International Corp., supra*, 704 F.2d at 449-50.

Particularly in cases alleging strict products liability, holding the government contractor defense generally inapplicable to failure-to-warn claims substantially erodes the protection of the United States' discretionary design decisions the Court deemed important in *Boyle.* As noted, the jury's failure-to-warn verdict, on which the Court of Appeal based its affirmance, was reached under an instruction that triggered a duty to warn of potential risks that were "knowable in light of the generally recognized and prevailing best scientific and medical knowledge at the time of manufacture and distribution," regardless of whether the risk was actually known, or reasonably could have been known, to a supplier in U.S. Polymeric's position.

The trial court's instruction, which accurately states California law, *Anderson v. Owens-Corning Fiberglas Corp.*, 53 Cal.3d 987, 1002, 281 Cal.Rptr. 528, 810 P.2d 549 (Cal. 1991) (in bank), as well as general common law principles, cannot be applied in cases involving military equipment designs without frustrating the

United States' interest in the performance of military procurement contracts. The exigencies of the national defense frequently require equipment designs that "push technology towards its limits and thereby incur risks beyond those that would be acceptable for ordinary consumer goods." *Harduvel v. General Dynamics Corp., supra*, 878 F.2d at 1316, *citing, Tozer v. LTV Corp.*, 792 F.2d 403, 406 (4th Cir. 1986), *cert den.*, 487 U.S. 1233 (1988), *quoting, McKay v. Rockwell International Corp., supra*, 704 F.2d at 449-50. In the military procurement context, there will always be a considerably heightened likelihood that high-technology designs employing cutting-edge materials will one day be found to pose safety risks. The present case presents an excellent example, as U.S. Polymeric and the other suppliers of asbestos-containing tapewrap to Kaiser were unaware of possible health hazards until the 1970s, after which they supplied warnings with the packaging in which their products were delivered. Enforcement of state strict liability claims for failures to warn of alleged design defects, therefore, has the same deleterious "direct effect" on the United States' interests that the Court found worthy of protection in *Boyle*: for example, the contractor could be forced to decline to manufacture government-approved designs. *Boyle*, 487 U.S. at 507.

In addition to conflicting with the United States' interests in the performance of military procurement contracts, the imposition of liability under state tort laws for failures to warn of defects in military equipment designs also fails to serve the policies favoring strict products liability. Both the Seventh and Ninth Circuits have noted, in pre-*Boyle* cases, that neither the purposes of enterprise liability (discouraging consumers from purchasing unsafe products by raising prices to reflect risk) nor market deterrence (deterring manufacturers from marketing unsafe products by encouraging the use of cost-justified safety measures) are furthered through the application of strict liability rules to military equipment suppliers. *McKay v. Rockwell International Corp., supra*, 704 F.2d at 451-52; *Bynum v. FMC Corp.*, 770 F.2d 556, 571-72 (5th Cir. 1985). The other interests normally considered as favoring strict liability — compensation of injury victims and enforcement of reasonable consumer expectations — are also diminished

considerably in the military procurement context. In *Boyle*, for example, the Court held that the government contractor defense applies in the same manner to claims by civilians as to claims by military personnel, even though civilians generally lack the "simple, certain and uniform compensation for injuries or death" the United States provides to military personnel under the Veterans' Benefits Act, 38 U.S.C. § 301, *et seq. Boyle*, 487 U.S. at 510-11; *Harduvel v. General Dynamics Corp., supra*, 878 F.2d at 1316 n.1.

In *Niemann v. McDonnell Douglas Corp.*, 721 F.Supp. 1019 (S.D. Ill. 1989), the United States District Court for the Southern District of Illinois applied the foregoing principles under facts similar to those in the present matter. In that case, which involved an action for wrongful death allegedly caused by a civilian mechanic's exposure to asbestos-containing "rub strips" used in the engine cowlings of military aircraft, the court held that the government contractor defense precluded enforcement of state failure-to-warn claims as having "the same negative effect on military procurement as outlined in *Boyle*," and that "the government's decision on the contents of [the aircraft in question] involves the same balancing of technical, military and even social considerations protected in *Boyle*." *Id.* at 1025. In two other pre-*Boyle* decisions, the government contractor defense was held applicable to failure-to-warn claims arising from allegedly defective swine flu vaccine and to a manufacturer's liability for failure to warn of the danger posed to humans by the accidental injection of brucellosis vaccine, which is intended for cattle. *Boruski v. United States*, 803 F.2d 1421, 1430 (swine flu vaccine); *Burgess v. Colorado Serum Co.*, 772 F.2d 844, 846-47 (11th Cir. 1985), *rehg. den.*, 778 F.2d 793 (4th Cir. 1985), (brucellosis vaccine). More recently, the Eleventh Circuit, in an opinion authored by the Honorable Lewis F. Powell, Jr., sitting by designation, held that the application of the government contractor defense to products liability actions, including claims for liability for failures to warn of alleged design defects, is "a necessary consequence of the incompatibility of modern products liability law with the exigencies of national defense." *Harduvel v. General Dynamics Corp., supra*, 878 F.2d at 1322. In cases where the factual predi-

cate for the defense exists, the *Boyle* government contractor defense should be held applicable to state-law claims for failures to warn of alleged defects in the designs of military equipment.

B. Section 402A of the Restatement (Second) of Torts Provides the Appropriate Reference for Determining Whether a State Products Liability Claim Is for Liability for Design Defects in Military Equipment

Petitioner submits that section 402A of the Restatement (Second) of Torts, which sets forth general common law products liability rules, provides the appropriate reference for determining whether a state products liability claim is for "liability for design defects" for purposes of the government contractor defense. Adopting the Restatement section for this purpose is necessary to ensure that the government contractor defense is effectively and uniformly applied, and displaces state tort law rules only to the minimum extent necessary. Adopting a uniform federal rule in this area is also consistent with the treatment of state-law claims in other areas involving important federal interests, in which federal, rather than state, law is uniformly applied to determine the substance of a plaintiff's claims.

Section 402A of the Restatement sets forth general common law rules for the liability of sellers of products for physical harm to users or consumers. Under the Restatement section, warnings are considered as a feature of the product at issue in determining whether the design is defective. Restatement § 402A, comment h (product sold without adequate warning of danger is "in a defective condition"); comment j (product supplied with appropriate warning "is not in defective condition nor is it unreasonably dangerous"); comment k ("unavoidably unsafe" product, when accompanied by appropriate warning, is neither defective nor unreasonably dangerous). Under section 402A, therefore, a product that is sold without appropriate warnings is considered to be defectively designed. *Id.; Ramey v. Martin-Baker Aircraft Co.*, 656 F.Supp. at 999-1000 (construing warnings as "safety components of the product the existence of which are dictated by the design specifications").

Reference to the Restatement section to determine the substance of a plaintiffs' claims is also implicit under *Boyle*, which relied heavily on the Ninth Circuit's analysis in a DOHSA case applying the government contractor defense to all section 402A claims save those for manufacturing defects. *McKay v. Rockwell Intern. Corp., supra*, 704 F.2d at 446. Displacement of state-law denominations of a plaintiff's cause of action by a uniform, Restatement-based rule is also consistent with the Eleventh Circuit's post-*Boyle* decision in *Harduvel v. General Dynamics Corp., supra*, 878 F.2d at 1317, in which the court ruled that Florida state law denominating the plaintiffs' cause as one for "manufacturing defects" was displaced by federal law determining that the claim was actually one for defective design. Were federal law not controlling of this issue, the Eleventh Circuit explained, "state law could operate either to defeat the defense or to expand it improperly, and the defense could not be applied with the uniformity that is a key justification for the application of federal law." *Id.* Finally, the large majority of United States jurisdictions have adopted rules consistent with those set forth in the Restatement as the basis for their products liability laws. Therefore, adopting section 402A should result in the minimum possible displacement of any conflicting state laws.

Adopting a uniform federal rule controlling the denomination of a plaintiff's claims for purposes of the government contractor defense is also consistent with the treatment of state-law claims in other areas of important federal interests.
Cf., Wilson v. Garcia, 471 U.S. 261, 269 (1985), *quoted in, Felder v. Casey*, 487 U.S. 131,154 n.1 (1988) (concurring opinion of Justice White) ("Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action").

On the other hand, adopting a general rule consistent with the present majority view that the government contractor defense does not generally apply to failure-to-warn claims would result in the displacement of state products liability law only in cases where the United States directly prevented the supplier from giving the product warnings required by state tort law. *New York*

Asbestos Litigation, supra, 987 F.2d at 813. Requiring a "direct conflict between federal and state law" as a prerequisite for the government contractor defense, however, would limit the scope of federal preemption too narrowly. *Boyle, supra*, 487 U.S. at 504, *citing, Florida Lime Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). As the Court explained in *Boyle*, adequately protecting the United States' interests in military procurement requires the displacement of state tort laws that create a "significant conflict" with these interests. *Boyle, supra*, 487 U.S. at 507. Such state tort laws necessarily include failure-to-warn claims. *In re Aircraft Crash Litigation Frederick, Maryland, supra*, 752 F.Supp. at 1365; *cf., Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941), *quoted in, Boyle*, 487 U.S. at 508, n.4 (state law cannot "conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations" in areas of "distinctive federal interest" in which Congress has provided comprehensive legislation).

For the foregoing reasons, Restatement section 402A should be regarded as the appropriate reference for determining whether a state products liability claim is for "liability for design defects" for purposes of the government contractor defense. The Court, therefore, should adopt the Restatement section as the basis for a uniform rule for this purpose.

III. HAD THE COURT OF APPEAL REACHED THE ISSUE, IT WOULD HAVE BEEN COMPELLED TO RULE THAT THE GOVERNMENT CONTRACTOR DEFENSE BARRED PLAINTIFFS' DESIGN DEFECT CLAIMS

Because the Court of Appeal affirmed the judgment based on the plaintiffs' failure-to-warn claims, it did not consider BP Chemicals' arguments on appeal that the trial court should have applied the government contractor defense to the plaintiffs' design defect claims. (Memorandum Opinion of Court of Appeal, p. 9). Had the Court of Appeal reached this issue, however, it would have been required to rule that the defense precluded liability under these claims.

As noted, the trial court struck the government contractor defense on the erroneous basis that the asbestoscontaining tapewrap was not a "military" product. (Reporter's Transcript of June 23, 1992, Hearing). In doing so, the trial court committed at least two separate errors: first, the court adopted the erroneous view that the government contractor defense focuses on the individual component part at issue in a lawsuit, rather than the product procured by the government; and second, even if the court's narrow focus on component parts were proper, the court erroneously ruled that U.S. Polymeric's asbestos-containing ablative tapewrap was not a "military" product. But for these errors, the undisputed evidence would have compelled the Court of Appeal to reverse the jury verdict on the plaintiffs' design defect claims.

A. The Trial Court Erred in Ruling That the Plaintiffs' Lawsuit Did Not Involve the Design of "Military" Products

The trial court struck the government contractor defense on the basis that U.S. Polymeric's asbestos-containing tapewrap was not a "military" product because it erroneously found: (a) that the fact that U.S. Polymeric's asbestos-containing tapewrap may have been developed prior to its involvement with government missile programs precluded application of the government contractor defense; and (b) that small quantities of the tapewrap may have been sold to commercial aerospace manufacturers. (Reporter's Transcript of June 23, 1992, Hearing). The trial court also erred in improperly focusing its inquiry under *Boyle* on the particular parts of the missiles on which the plaintiffs focussed their design defect claims, rather than the missiles themselves, which were the products procured by the government.

1. The Trial Court Erred by Focusing Its Inquiry on the Tapewrap Supplied by U.S. Polymeric Instead of the Missiles Procured by the Government

The trial court erred in focusing its inquiry on the issue of whether U.S. Polymeric's asbestos-containing tapewrap was a "military" product, instead of focussing on the Poseidon and Polaris missile programs on which the tapewrap was used, which

clearly were "military." This exact issue was held as dispositive in *Niemann v. McDonnell Douglas Corp., supra,* 721 F.Supp. 1019, involving the use of asbestos "rub strips" in certain military aircraft designs. Id. at 1021-22. In granting summary judgment for the defendant, the court squarely rejected the plaintiff's contention that the Boyle defense was inapplicable because the asbestos rub strips were not "military," but, instead, were "commercial," "stock products":

> The plaintiff further urges that the government contractor defense is inapplicable in that the asbestos containing product was of such a commercial nature that there can be no federal interest, and thus no conflict exists between federal and state law. The plaintiff argues that the government must have a significant interest in the particular feature it ordered the contractor to make. (citation omitted). As previously stated, the particular products at issue in the instant case are the aircraft themselves and not, as plaintiff urges the court to find, the pieces of asbestos that was [sic] a component of the aircraft.

Id. at 1023.

Furthermore, in every located case that has expressly decided this issue, the courts have uniformly ruled that the correct focus for determining whether a "military" product is involved is on the product as a whole acquired by the government, not the specific part a plaintiff claims was defective. *See: In re Aircraft Crash Litigation Frederick Maryland, supra,* 752 F.Supp. at 1351 (government contractor defense applied to "non-specified equipment on the aircraft" because government "approved the Detail Specification for the aircraft as a whole"); *Smith v. Xerox Corp.* (5th Cir. 1989) 866 F.2d 135, 138; *Maguire v. Hughes Aircraft Corp.* (D.N.J. 1989) 725 F.Supp. 821, 823-24, *aff'd*, 912 F.2d 67 (3d Cir. 1990); *Wilson v. Boeing Co.* (E.D. Pa. 1987) 655 F.Supp. 766, 773.

Had the Court of Appeal reached this issue, therefore, it would have been required to hold that the plaintiffs' lawsuit involved

"military" products. The fact that the foregoing cases involved the designs of military airplanes (*Niemann, In re Aircraft Crash Litigation Frederick, Maryland*) and helicopters (*Boyle*), while the present case involves the designs of strategic guided missiles, does not make any difference with regard to the application of the government contractor defense to the plaintiffs' design defect claims.

2. In the Alternative, the Trial Court Erred by Ruling that U.S. Polymeric's Asbestos-Containing Tapewrap Was Not a "Military" Product

In the alternative, even if the trial court's narrow focus on the design of U.S. Polymeric's asbestos-containing tapewrap were proper, the ruling that the tapewrap was not a "military" product was clearly erroneous. A product is "military" for purposes of the government contractor defense so long as it was selected by the government because of qualities that served the military's purposes. This is true regardless of whether the product was developed before the contractor's involvement in military procurement programs. Furthermore, the defense applies even though a product was sold commercially, so long as the commercial sales were no more than "incidental." Therefore, the trial court erred, regardless of which basis for its ruling was dispositive.

a. A Product Is "Military" if it Was Selected by the Government Because of Qualities That Served The Military's Purposes, Even if Developed Before the Contractor's Involvement in Military Programs

For purposes of the government contractor defense, a product is "military" if it was "produced according to military specifications and used by the military because of particular qualities which serve a military purpose." *Jackson v. Deft, Inc. supra*, 223 Cal.App.3d at 1319. In the instant case, U.S. Polymeric's director of technical support, Don Beckley, established through uncontroverted trial testimony that the tapewrap was manufactured according to detailed military specifications. (A.B., p. 23). Mr. Beckley also testified that the tapewrap was selected for use in support of the Poseidon and Polaris programs because its ablative qualities were required to protect the rocket motor sys-

tems from heat damage. *Id.* Mr. Beckley testified that the military required the use of asbestos-containing tapewrap in these missiles because it was the best material available at the time. *Id.* Hence, the tapewrap was a "military" product under the test set forth in *Jackson v. Deft, Inc.*

So long as these factors are satisfied, it is simply irrelevant to the government contractor defense that the product at issue was originally developed before the contractor's involvement in military programs. *In re Brooklyn Navy Yard Asbestos Litigation*, 971 F.2d 831, 839 (2d Cir. 1992) (affirming defendants' summary judgment on design defect claims in cases involving "off the shelf" asbestos products). The government's interest in military procurement would be ill-served were contractors required to invent every component of a military weapons system from scratch for the defense to apply.

b. The Possibility That a Product Was "Incidentally" Sold Commercially Does Not Affect its "Military" Status

Furthermore, the fact that a product may incidentally have been sold on the commercial market does not affect its "military" status under the government contractor defense. *Jackson v. Deft, Inc., supra*, 223 Cal.App.3d at 1319 (rejecting view that "military equipment means a product made exclusively for military use with no commercial purpose"). Instead, the military status of a product is only affected when the majority of a manufacturer's sales are commercial rather than military. *In Re Hawaii Federal Asbestos Cases, supra*, 960 F.2d at 813 (defense inapplicable where "the military constituted a relatively insignificant purchaser," and product was "primarily sold to private companies"); *Dorse v. Armstrong World Industries, Inc.* (Fla. 1987) 513 So.2d 1265, 1269.

In the present case, it was undisputed that U.S. Polymeric's asbestos-containing tapewrap was manufactured almost exclusively for use in military programs. For example, Mr. Beckley testified that, although U.S. Polymeric supplied tapewrap to the commercial aerospace industry, this tapewrap was comprised of fiberglass or other non-asbestos products almost exclusively. (A.B., p. 25). This was because asbestos was only useful as an

ablator, which the commercial aerospace industry did not need. *Id.* Consequently, very little, if any, asbestos-containing products were sold by U.S. Polymeric outside of the military defense industry. *Id.* Any such incidental sales of asbestos-containing tapewrap do not affect the application of the government contractor defense to this case.

B. All of the Elements of the Government Contractor Defense Exist in this Case

During the trial, U.S. Polymeric submitted undisputed evidence in support of each element of the three-prong factual test the Court adopted in *Boyle*. This included undisputed evidence that: the government specifically required U.S. Polymeric's tapewrap, which itself was produced in accordance with detailed government design specifications, to be used the Poseidon and Polaris missile programs; the tapewrap was manufactured in conformity with the government's specifications; and the government's knowledge of asbestos hazards when it procured the tapewrap was far superior to U.S. Polymeric's. Each element of the government contractor defense, therefore, was established by undisputed evidence.

1. The Government Approved the Design of U.S. Polymeric's Tapewrap and Required Its Use in the Poseidon and Polaris Missile Programs

The government's approval of "reasonably precise design" specifications required by *Boyle* is established where, as in the present case, the specifications for the missiles on which U.S. Polymeric's products were used resulted from "back and forth" discussions between the government and its contractors, with the government giving final approval of the design, including the materials to be used. *Harduvel v. General Dynamics Corp., supra*, 878 F.2d at 1320; *Koutsoubos v. Boeing Vertol, supra*, 755 F.2d at 355. The government's approval of design specifications for U.S. Polymeric's tapewrap is also established in another way in this case, as U.S. Polymeric "incorporated government specifications" into the design of the product, which "the government subsequently reviewed and approved." *Harduvel v. General Dynamics Corp., supra*, 878 F.2d at 1320; *Smith v. Xerox Corp., supra*, 866 F.2d at 138.

At trial, Mr. Beckley testified at length regarding the design and development process involved in the Poseidon missile program, through which the government selected the materials that would be required for missile production, as a typical example of the government's management of missile programs. (A.B., p. 26). This process began with the military's decision to develop a new missile with particular characteristics. *Id.* The military then called in a prime contractor, who, in turn, sought subcontractors with expertise in various areas, including rocket propulsion. *Id.* During this time, the contractors' suppliers, including U.S. Polymeric, would assist in identifying which of their products would be best for use in missile parts to be supplied, and would determine whether new, improved materials could be developed. *Id.*, pp. 26-27. The government required these materials to be rigorously tested; for example, the U.S. Polymeric products that were used in rocket motor construction were subjected to at least 120 motor test firings before receiving government approval. *Id.*, p. 27.

Eventually, as a result of this back-and-forth process between the government and the contractors, the design of the missile, including materials specifications, was finalized into a government Weapon Specification. (A.B., p. 27). The Weapon Specification governing the design of the Poseidon missile was WS 8911. *Id.* The Weapon Specification listed the exact materials that would become part of the "qualified products list" for manufacturing the missile's component parts. *Id.* Once the Weapon Specification was finalized, the suppliers, including U.S. Polymeric, were prohibited from deviating from its specifications either in the raw materials they used or in the process by which their products were made. *Id. No changes were allowed.* For example, when U.S. Polymeric decided to stop manufacturing asbestos products, *it was required under federal law to continue supplying asbestos-containing tapewrap when its product was the only one qualified for use on a missile program. Id.*

Therefore, the government clearly approved reasonably precise design specifications for the products at issue in this case. As set forth above, the designs of the missiles in which U.S. Polymeric's tapewrap was used were developed through a "back and forth" process between the military and its suppliers, with the military

exercising final design approval. Moreover, U.S. Polymeric's asbestos-containing tapewrap was manufactured according to military specifications, and was reviewed and approved by the military for use in the missiles. Finally, the applicable Weapon Specification prohibited U.S. Polymeric from deviating in the materials or processes used to manufacture its asbestos-containing tapewrap. Hence, the first element of the *Boyle* test was clearly satisfied by the undisputed trial evidence.

2. Both U.S. Polymeric's Tapewrap and the Missiles in Which it Was Used Were Manufactured in Conformity With the Design Specifications

The second prong of the *Boyle* test requires that the contractor have supplied the product in conformity with the government-approved specifications. *Boyle*, 487 U.S. at 512. The courts have held that product conformity for purposes of the government contractor defense can be established in several ways. First, conformity can be established by showing that the government accepted and used the finished product. *Smith v. Xerox Corp., supra,* 866 F.2d at 138-39; *Niemann v. McDonnell Douglas Corp., supra,* 721 F.Supp. at 1337; *Hazard, Inc. v. Panco* (Va. 1990) 240 Va. 438, 397 S.E.2d 866, 868. Conformity also can be established when the government used the product for several years, or performed inspections or maintenance and then returned the product to service. *Smith v. Xerox Corp., supra,* 866 F.2d at 138. Where, as in the present case, there was no contrary evidence submitted, the courts have consistently accepted either one of these methods as sufficient to establish the second prong of the *Boyle* test. *See: Niemann v. McDonnell Douglas Corp., supra,* 721 F.Supp. at 1027; *Smith v. Xerox Corp., supra,* 866 F.2d at 138-139.

At trial, the plaintiffs did not submit any evidence that either the missiles or U.S. Polymeric's tapewrap, as manufactured, deviated in any way from their design specifications. Instead, the plaintiffs' case against U.S. Polymeric was based on the use of asbestos in the tapewrap, which was required by the government. Further, BP Chemicals introduced evidence that U.S. Polymeric's tapewrap was inspected after delivery to Kaiser, to ensure it was suitable for use on the missile programs. (A.B., p. 29).

Accordingly, there is no dispute that both the missiles in which U.S. Polymeric's tapewrap was used, like the tapewrap itself, were manufactured in conformity with their design specifications. Therefore, the second element of the *Boyle* test is satisfied.

3. The Government Had Superior Knowledge of Asbestos Hazards

The third prong of the *Boyle* test requires that the supplier have warned the government of all dangers in the use of the product that were actually known to the supplier but not to the government. *Boyle*, 487 U.S. at 512. The test does not require the contractor to warn of dangers of which the government actually knew. *Stout v. Borg-Warner Corp., supra,* 933 F.2d 331, 336 (5th Cir. 1991); *Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1487 (5th Cir. 1989) *reh'g den.*, 876 F.2d 1154 (5th Cir. 1989); *cert. den.*, 493 U.S. 935 (1989); *Niemann v. McDonnell Douglas Corp., supra,* 721 F.Supp. at 1028.

At trial, it was undisputed that, until the mid-1970s, U.S. Polymeric was not aware of any health hazards associated with asbestos-containing tapewrap, and that, after learning of the hazard, it included warnings with the packaging in which its asbestos-containing products were delivered. (A.B., pp. 29-30). It was also undisputed that the government had knowledge of asbestos hazards from at least 1946 onward. *Id.*, p. 30. Consequently, U.S. Polymeric lacked any duty to warn the government of asbestos hazards, and, therefore, the third element of the *Boyle* test is satisfied, as well.

C. Had it Reached the Issue, the Court of Appeal Would Have Been Required to Rule That the Government Contractor Defense Applied to the Plaintiffs' Design Defect Claims

For the reasons set forth above, had the Court of Appeal considered the application of the government contractor defense to the plaintiffs' design defect claims, it would have been compelled by the undisputed evidence to rule that every element of the government contractor defense was satisfied. Consequently, the Court of Appeal would have been required to reverse the jury verdict for the plaintiffs on the design defect claims.

CONCLUSION

For the reasons set forth above, the Court should grant the petition for a writ of certiorari in this matter.

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